and it is that demonstrated conduct that "raise[s] [the] consumer concern." The concern is based on facts.

U S WEST proposes that the Commission use the facts in its possession, as well as additional facts reported by IXCs,[36] to fashion a surer, swifter type of economic justice than even Congress proposed in Section 258. The specifics:

- Companies whose ratio of slamming complaints exceeds five percent of the service-change orders they submit would be fined $100 for every complaint over the five percent threshold.[37] The threshold for the $100 fines would be reduced to four percent after one year, to three percent after two years, and to two percent after three years. By this reduction, the Commission would demonstrate its serious resolve to get slamming complaints under control over a three-year period, despite the existence of increased competition.[38]

- Companies whose ratio of slamming complaints exceeds 10 percent of the service-change orders they submit would be fined $250 for every complaint over the 10 percent threshold. The threshold for the $250 fines would be reduced to eight percent after one year, to six percent after two years, and to four percent after three years.

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[36] IXCs would be responsible for sending quarterly reports to the Commission showing the number of new customers they have signed up and the number of complaints from customers saying that they did not authorize the change. In addition, U S WEST believes that the IXCs routinely get reports from local exchange carriers ("LEC") that advise them of information about complaints associated with unauthorized conversions. The IXCs should be required to submit the information in these reports to the Commission with whatever *caveats* they deem appropriate. (IXCs often take issue with the characterization "disputed" and could be expected to do so even more often to the extent that monetary fines were associated with the characterization. However, we believe U S WEST's plan builds in a "margin of error" that should minimize this problem.)

[37] Under this threshold, the largest three IXCs would not, in U S WEST's territory at least, fall under this approach. Enforcement against them would need to proceed pursuant to other mechanisms.

[38] The message that no one wants sent is that increased competition will "necessarily" result in increased slamming.

- NALs would be issued quarterly by the Commission with the fine/forfeiture amount calculated according to the above schedules.[39]

- In addition to the above, the Commission should grant authority to Executing Carriers to impose on carriers which exceed the above-stated thresholds verification methods more limited than the Commission's general verification options currently permit. Executing Carriers should be permitted to require either a submitted written LOA or a third-party verification approved by the Executing Carrier for each new customer the Submitting Carrier claims.[40] This requirement would continue until the Submitting Carrier brings its slamming-complaint ratio below the penalty threshold.

U S WEST believes that the above enforcement plan, as supplemented by Section 258 and the proposed new rule proposed by U S WEST below would go considerably farther in correcting the current slamming problem than the proposal outlined by the Commission, which focuses almost exclusively on Section 258 implementation and the application of the Commission's telemarketing rules to in-bound calling.

III. COMMUNICATIONS AFTER PC CHANGES ARE LAWFUL SPEECH

The NPRM contains a discussion about whether ILECs should be subject to special or different treatment in the area of submissions or executions of PC requests because of certain putative "advantages of their incumbency."[41]

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[39] A five percent or a 10 percent threshold seems quite sufficient to accommodate some margin of error for those conversions which a LEC shows as disputed or unauthorized, but which an IXC considers otherwise.

[40] The Executing Carrier should be permitted the choice of establishing administrative processes to receive and store written LOAs or to approve a third-party verification process and entity (perhaps with audit rights). Since the more restrictive corrective processes will be necessary because of wrongdoing on the part of the Submitting Carrier, the Executing Carrier should be able to determine which is the least administratively burdensome to it.

[41] NPRM ¶ 15.

Specifically, the Commission suggests that there might be a "blur[ring] of roles" if an ILEC executes PC changes for others and communicates to customers when a PC change results in the ILEC losing a customer.[42] Additionally, the Commission inquires whether such a communication would violate its existing PIC verification rules (prohibiting carriers from combining LOAs with inducements in the same document) or would otherwise be inconsistent with the Act's consumer protection or pro-competition goals.[43]

The answers, like the questions, are multiple. First, there is no blurring of roles when an ILEC speaks to individuals on its own behalf based on ILEC information. Any speech in which an ILEC engages based on its own information cannot be found to be contrary to the consumer protection or pro-competition goals of the Act because there is nothing in the Act to suggest that suppression of lawful speech is a goal.

The Commission should not interfere with "promotional letter[s]" that may be sent to "subscriber[s] who ha[ve] chosen a new LEC . . . in an attempt to change the subscriber's decision,"[44] because -- barring deception or misrepresentation -- such communication is entirely lawful and is protected speech under the First Amendment. To the extent that an ILEC bases its communication on information that is rightfully its own or jointly proprietary (and not singularly another

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[42] Id.

[43] Id.

[44] Id.

carrier's),[45] the communication should be free of any governmental prior restraint on the contents or regulatory intervention on the issuance of the communication.

Clearly, every carrier has a right to know what customers it serves. That includes customers it has gained and customers it has lost in any given time period. Indeed, such reports have been made available to IXCs since divestiture. Such reports form the foundation for "win-back" communications, which often provide the customer being pursued with additional market or product benefits, and -- more recently -- have also demonstrated that customers did not know they had been switched in the first instance. Increased customer information and choices are the result of such communications and such communications should not be interfered with through extensive regulation.

Second, the Commission's existing LOA rules do not apply to ILECs, so there is clearly no current "violation" associated with such communications. It is clear that an ILEC communication with a customer that is leaving or has left for another carrier does not violate the Commission's existing LOA rules because such rules are applicable only to IXCs.[46] Moreover, the communication the Commission provides by way of example is itself <u>not obviously</u> an LOA.[47] It is a prior communication that

[45] This latter situation would implicate Section 222(b).

[46] 47 C.F.R. § 64.1150.

[47] <u>NPRM</u> at n.51. If the communication was part of an LOA and was not a "separate document" or "an easily separable document containing only the authorizing language," then it might not comply with the requirement of the Commission's rules were those rules extended as written to other than IXCs.

might well lead to an LOA, but it clearly contemplates some communication back from the customer before any contractual relationship is finalized or confirmed.

Not every communication with an individual is an LOA. So long as the actual LOA document conforms to the Commission's rules and requirements, and the promotional language or communication is separate, there is nothing inappropriate about prior communications, including communications that include the offering of an inducement within the text of the communicated message.[48]

Third, the consumer protection and pro-competition goals of the Act cannot be compromised by carriers engaging in constitutionally-protected speech, particularly where the communication often discloses customer confusion and misunderstandings about the speech of other carriers. Indeed, as discussed more extensively below, current carrier communications lace their documents and text with phrases about "local long distance" or "local toll" that customers clearly find confusing, so much so that customers assert they never authorized changes from their existing local service provider (i.e., an ILEC) and are surprised to know that such has occurred. Follow-up communications from prior service providers (i.e., ILECs) have actually discovered this "slamming problem" in the making, which means it can be acted upon sooner rather than later. Quick action to correct the

[48] 1995 Report and Order, 10 FCC Rcd. at 9569 ¶ 18 ("Carriers are free to use whatever promotional materials they choose, and whatever avenues for distribution of those promotional materials that they choose. All we are requiring is that they comply with our minimal requirement that the actual document authorizing a PIC change be separate or severable from the promotional materials so that it is clear to the consumer that signing that document will do just that.").

"root cause" of the problem -- misunderstood communications[49] -- can stem the tide of this particular problem early.

IV. ESTABLISHMENT OF NEW DISCLOSURE RULE FOR PC CHANGES

The Commission is correct to be concerned about the insinuation of slamming conduct into the local and intrastate markets as competition in those markets begins to burgeon. U S WEST is encountering actual misrepresentations of identity from unscrupulous service providers -- with the caller claiming to be U S WEST or with U S WEST[50] and the service "switch" claiming to be a simple consolidation benefit to be enjoyed by the customer from a consolidated bill.[51]

With other, more reputable providers, there is a different problem which has to do with the terms used in solicitation communications, as well as in LOAs and PC freeze communications, associated with existing toll and -- perhaps -- local service.[52] The terms used or the services being switched and/or frozen are either not communicated meaningfully or are not understood by potential customers. What is

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[49] It is not that the communication is *per se* misleading, because some individuals might understand it and some communications actually seek -- albeit in small print -- to further describe it. But the language being used is <u>not language calculated to be understood</u> by the vast majority of consumers.

[50] U S WEST has sent more than 70 cease-and-desist letters in the last 12 months to carriers misappropriating U S WEST's name in their communications.

[51] A copy of a recorded conversation between such a caller and a customer is attached. It is disgusting in its misrepresentation and its tenacious attempt to make a mockery of the notion of customer consent. <u>See</u> Attachment.

[52] U S WEST has in its possession an IXC LOA and a PC freeze communication (from different IXCs) that both use the term "local toll." In one communication no further explanation is provided. In the other, in small footnoted print, there is a further description of the term ("calls outside your local calling area but not far

clear is that customers, when switching IXCs, do not understand they are going to lose the services of their existing toll carrier and maybe even their local service provider, even if that information has been conveyed "formally."[53]

BellSouth recently reported that a survey of Florida consumers who have switched local toll carriers **showed that more than 42 percent of them had no idea that their service had been switched.**[54] BellSouth's statistics are comparable to those being realized in U S WEST's territory -- something that often is being disclosed in the "follow-up" communications, such as those described in the preceding section.[55] Should this type of "miscommunication" continue or grow -- and it well could given the Commission's recent addition of the term intraLATA into the LOA rules[56] -- customers will realize increased "slamming," in not only the toll market, but in the local market, as well.

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enough to be long distance. They may also be known as in-state long distance, local long distance, regional, or shorter distance calls.").

[53] NPRM ¶ 20 and n.63 (noting correspondence received by the Commission wherein customers alleged that IXCs unlawfully and without customer consent switched a customer's local service provider).

[54] The survey involved 100,000 BellSouth customers -- not a small or insignificant sample.

[55] Often, the first a customer knows about the switch is when U S WEST makes a "win-back" contact, demonstrating further not just the commercial and pro-competitive nature of such contacts, but the consumer protection aspect of them, as well.

[56] U S WEST supports full and fair disclosure in both oral and written contexts. However, it is clear that customers do not understand the term "LATA" any more than they understand the current vernacular of "local toll" or "local long distance." U S WEST Opening Comments, CC Docket No. 96-115, filed June 11, 1996 at 11 n.29. "U S WEST continues to encounter customers who do not understand (and often do not like) the fact that there are various providers of commodities called 'intraLATA' and 'interLATA' service." And compare, the Commission's CPNI

While individual companies will have to ferret out the facts associated with certain commercial frauds before approaching the Commission formally,[57] the Commission can take preventive action now with respect to customer understandings and carrier communications. The mere application of the existing verification rules does not really address the current problem. The Commission should enact a rule establishing affirmatively "full and fair disclosure" obligations pertaining to all carriers with respect to material information associated with carrier solicitations, changes, and freezes.

Because, as the Commission observes correctly, whatever submission and execution procedures it establishes will be tied to the remedy outlined in Section 258(b),[58] the Commission should establish a ubiquitous rule regarding carrier/customer communications that encompasses all such communications --

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Notice of Proposed Rulemaking at n.57 where the Commission defines the terms "short-haul toll" as "intraLATA toll" and "interexchange" as "interLATA." In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking, 11 FCC Rcd. 12513, 12524 n.57 (1996).

The fact that the Commission has recently determined that the term "intraLATA" should be added to the form/content of an LOA (MO&O ¶¶ 42, 66-77; Section 64.1150(e)(4)), while it renders the communication more "accurate" from a regulatory perspective and appeases carriers, it will only exacerbate the problem unless the term is converted to language that consumers do understand. The use of the term, unexplained, will no more constitute a "full and fair disclosure" than the use of other terms or phrases as referenced in note 49, infra.

[57] U S WEST is in the process of attempting to secure affidavits from certain parties as to both the verified identity and the facts associated with one IXC (with respect to which U S WEST has more than 20 customer complaints) which is representing itself as U S WEST -- a matter which not only dilutes our goodwill with our customers but infringes on our trade name, as well.

whether associated with initial solicitations for services, service changes, verification processes, or freezes. Furthermore, our proposed rule has the advantage of being particularly suited to oral communications, which might alleviate further verification procedures being required on incoming calls (a matter addressed more fully below in Section VI).

In making our recommendation, we ask that the Commission keep in mind that U S WEST represents not just an ILEC, but a new entrant, as well. For either type of carrier, full and fair communications advance -- rather than retard -- competition, as such communications clearly promote the public interest.

U S WEST recommends a new subsection (a) (followed by the remaining sections, renumbered) that would read:

> A carrier may not establish a contractual relationship or freeze a subscriber's account for telephone toll service or telephone exchange service or change a subscriber's existing carrier unless full and fair disclosure of the types of services involved are explained in language calculated to be understood by the subscriber and the effects of the change of carrier as to the services involved, including the fact that there will be a substitution of the soliciting carrier for the existing carrier, are made in the language spoken by the subscriber.[59] The subscriber must be given the opportunity to change carriers only with respect to the specific service(s) the subscriber desires. A carrier must secure the express and affirmative approval of the subscriber to make a carrier change with respect to specific services as part of the approval process

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[58] NPRM ¶ 9.

[59] This might also read: "A carrier may not establish a contractual relationship or freeze a subscriber's account for telephone toll service or telephone exchange service or change a subscriber's existing carrier unless the carrier *fully and accurately informs the subscriber* of the types of services involved, explained in language calculated to be understood by the subscriber and describing the effects of the change of carrier as to the services involved, including the fact that there will be a substitution of the soliciting," etc. The italicized language paraphrases language used in the Commission's NPRM ¶ 24 with respect to a different matter. However, the end result would be the same in terms of the obligation.

and shall confirm with the subscriber the specifics of the carrier arrangements prior to submitting a PC order, service-change order, or freeze.

Such a rule should require that communications involving carrier switches or freezes make clear the consequences associated with the switch as it affects the individual's existing carriers -- be they intrastate/interstate or intraLATA/ interLATA.[60] Furthermore, such a rule would not "place an unfair burden on consumers to prove that an unauthorized conversion occurred,"[61] because the facts of full and fair disclosure should be obvious from any written communication. And, in the event that carriers choose to rely on an oral communication and verification, carriers -- rather than customers -- would have the burden of demonstrating compliance with the requirement.[62] A scripted discussion piece might prove the "full and fair disclosure."[63]

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[60] While the Southern New England Telephone ("SNET") PC freeze communication is being attacked by at least two IXCs, it has the distinct advantage that it -- at least -- makes clear that execution of the document will result in "a change in [the] in-state long distance carrier from [the] current carrier" and a "change in [the] out-of-state long distance carrier from [the] current carrier." Neither of the IXC documents in U S WEST's possession ever references an "existing carrier" or the fact that execution of the document will result in a change in the *status quo* with respect to that carrier.

[61] NPRM ¶ 20. The Commission made this inquiry with respect to the application of its existing telemarketing rules to in-bound calling verifications, but the concept is applicable equally in this context.

[62] This is not an unusual situation. In those circumstances where there are oral agreements, the party attempting to prove the existence of an agreement generally faces certain evidentiary problems. One weighs the convenience of the oral nature of the agreement against the costs of being unable to prove its existence in all cases.

[63] A carrier certainly need not prove that the disclosure was understood fully, just that it was crafted and communicated in a manner that met the regulatory standard.

V. VERIFICATION OPTIONS

U S WEST supports allowing carriers the maximum flexibility -- not the lessening of options -- regarding commercial practices between themselves and consumers. Thus, while U S WEST has not determined whether we would utilize a "welcome package" option with respect to our service offerings and customer choices, we do not support the elimination of this option. Nor can we support the Commission's suggestion that ILECs be confined to a single verification option, i.e., third-party verification. The suggestion itself seems misdirected and based on pure speculation about future conduct. There is ample time and opportunity to address ILEC bad actions should they materialize.

A. Welcome Package Option

U S WEST disagrees with the Commission's tentative conclusion that such a package can be or is "used in the same manner as a negative-option LOA."[64] The current welcome package option is not a "negative option." Nor is it "used" as one.

The welcome package option is predicated on a prior customer approval, supposedly granted freely in the context of a commercial transaction.[65] The mailing simply confirms the conversation and the customer choice, allowing the customer to back out of the prior agreement should he/she desire. In this regard, the welcome

[64] NPRM ¶ 18.

[65] Id. ¶ 17 (noting the prior comments of parties that "this verification option is unlike a negative-option LOA in that consumers have already given their oral agreement during a telemarketing call to change their service."), MO&O ¶ 63 and nn.165-66.

package operates more like a "right of rescission"[66] than a negative option. In that respect, it expands customer choices and operates in a pro-consumer fashion rather than in an abusive manner.

The Commission is incorrect in its assertion that "in practice" the difference between a negative-option LOA and a welcome package verification "may be blurred."[67] Read literally, the current rule is quite explicit. A welcome package may be used only after a "customer's request for a PIC change."[68] Yet, the example given by the Commission assumes a fundamental violation of the rule in the first instance, and then assumes that the action taken after the original violation is somehow lawful.

The example the Commission relates is as follows: "an unscrupulous telemarketer sends to a subscriber *who has not consented to a PC change* a post card designed to be used by the subscriber to deny, cancel, or confirm a PC-change order. Under the current rule, if the subscriber does not return the post card, *the carrier may execute the PC change after 14 days,* even if the subscriber does not return the post card."[69] Thus, the example assumes a violation of the rule and then concludes erroneously that the rule violator may execute (or more properly, submit) the PC change after 14 days. This is incorrect.

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[66] See 15 U.S.C. §§ 226.15, 226.23, 1635 (Truth in Lending Regulations - Right of Rescission); 16 C.F.R. § 429.1 (Rule Concerning Cooling-Off Period for Sales).

[67] MO&O ¶ 64.

[68] 47 C.F.R. § 64.1150(d).

[69] MO&O ¶ 64 (italics added).

The Commission should not eliminate one of its existing verification options available to and potentially used by hundreds of carriers in an effort to address acts by "unscrupulous telemarketer[s]." As it does with other fundamental slamming actions, the Commission should treat the carrier that violates the existing rule in a punitive manner and allow the benefit of multiple verification options to inure to those that act lawfully and appropriately.

Retaining the welcome package option is all the more critical should the Commission remain resolute in its position that its existing verification rules will apply to in-bound customer calling. Unlike some of the other verification options, the welcome package is suited to an oral transaction, which U S WEST believes customers are going to demand.

B. Limiting ILEC Verification Options

The Commission suggests that ILECs will have an enhanced ability to make unauthorized PC changes on their own behalf and without detection.[70] Noting that such anticompetitive behavior could be addressed within the context of Section 208, the Commission inquires as to whether additional safeguards are necessary up-front to prevent such occurrences.[71]

The answer is "no." There is nothing in Section 258 -- which on its face pertains to all "telecommunications carrier[s]" -- which suggests that in the absence of demonstrated abuses any carrier should be subject to special or restricted

[70] NPRM at n.49, ¶ 15, n.54.

[71] Id. n.54.

verification procedures over and above the general procedures "the Commission shall prescribe."[72]

Indeed, the Commission's suggestion is extremely ironic. If anything, one would expect that IXCs -- the companies that have caused the slamming problem in the first place -- might be the carriers subject to "special" or restrictive treatment.[73] It is entirely inappropriate to saddle other carriers, such as the ILECs, with fewer options than their potential competitors when those ILECs have not even engaged in behavior that could be pointed to as unlawful or inappropriate.

Many of the ILECs have not even gotten into the interexchange business in any significant way and there is already discussion of their "enhanced ability or incentive" to engage in conduct which they have historically abhorred and have characterized as deceptive, unlawful, and -- sometimes -- criminal. The Commission should not **assume** that ILECs will engage in slamming conduct and should not restrict the PC change options available to the ILECs. The Commission should allow the passage of time to demonstrate whether such behavior actually occurs, is tolerated by an ILEC,[74] or fails to materialize. There is ample opportunity, as the Commission notes, to handle idiosyncratic carrier bad acts through the complaint

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[72] 47 U.S.C. § 258(a).

[73] Indeed, MCI itself has indicated its support for mandatory independent third-party verification for residential and small business customers unless the subscriber directly contacts a LEC to change the service provider. MO&O ¶ 45 and n.130, referencing an MCI *Ex Parte* espousing this proposal.

[74] For example, should some overzealous employee engage in such conduct, an ILEC that took prompt and appropriate disciplinary action would demonstrate that -- while there might be some limited ability to engage in such conduct -- there was no incentive to do so and no tolerance of such conduct.

process or to initiate an additional rulemaking to address persistent problems, should such problems actually develop.

The pro-consumer, pro-competitive goals of the Act strongly support equanimity of treatment among competitive parties. There is no reason to erect additional "protections" around ILEC conduct in the absence of demonstrated abuses or specific Congressional mandate.

VI. IN-BOUND TELEMARKETING

U S WEST is of the opinion that the Commission was correct when it stayed that aspect of its telemarketing rules that pertained to customer-initiated in-bound calls to carriers.[75] Thus, U S WEST was disappointed when, in the recently issued Memorandum Opinion and Order on Reconsideration, the Commission determined to reinstate those rules.

U S WEST herein asks for reconsideration of that aspect of the Commission's MO&O.[76] With some exceptions, the Commission's existing verification rules are

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[75] NPRM ¶ 19 and n.61, citing to the Commission's In-bound Stay Order, 11 FCC Rcd. 856 (1995), which -- despite the Commission's rejection of the policy/cost arguments raised against its application in various petitions for reconsideration ("PFR") -- remains in effect for the time being.

[76] To seek reconsideration of a Commission order, when one was not a party to the proceeding, requires a demonstration of "the manner in which the person's interests are adversely affected by the action taken, and [a showing of] good reason why it was not possible for him to participate in the earlier stages of the proceeding.") 47 C.F.R. § 1.106(b)(1). Because, as the Commission itself observes, its 1995 Report and Order pertained only to interexchange services and IXCs that provide such services (MO&O ¶ 43), the only parties that would have been expected to file petitions for reconsideration of the 1995 Report and Order would have been IXCs. No LEC would have, or could have, been expected to file.

However, the intersection between the Commission's MO&O and the NPRM makes clear that the "issue" of the application of the Commission's telemarketing not well designed for application to an in-bound calling environment. And, even when designed in a manner that can accomplish such application, the rules are overregulatory, sometimes operate contrary to predictable consumer conduct, and burden commercial transactions that should be entitled to "easy-to-do-business-with" treatment.

A customer-initiated call to a carrier can be of one of two types. First, the call can be the result of a pre-formed intention to order service. In this situation, the call is not a "telemarketing call" at all. It is a call made by the customer where the purpose and intent is to enter into an agreement, most likely oral. Second, the call might be an "inquiry" call. The inquiry might be about a promotion the individual saw or in response to other inducements.[77]

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rules to in-bound calling has, in some respects, been resolved -- at least with respect to policy arguments associated with the determination. See MO&O ¶¶ 44-51. All that remains to the NPRM is an inquiry on costs, theoretically so that a more meaningful cost/benefit analysis can be conducted than was made possible by the reconsideration petitions filed previously. Id. ¶ 51; NPRM ¶¶ 19-20. It is clear that the Commission proposes to include the provisions of its existing verification rules to in-bound calling received by LECs (NPRM at Appendix C, Proposed Rule Changes §§ 64.1100 and 64.1160(a)). For that reason, in addition to merely filing the cost information requested by the Commission in the NPRM, U S WEST requests a fundamental reconsideration of the Commission's decision in the MO&O. A decision to impose rules that had been stayed and are now proposed to become applicable to all carriers should not be imposed on all carriers through a Reconsideration Order supplemented by an NPRM where only some carriers participated in the reconsideration process. Rather, such an imposition should be made only after opportunity for comment and consideration by all affected carriers.

[77] Note the Commission's reference to contests, etc., in both the MO&O (¶ 44) and the NPRM (¶ 20).

The Commission's desire to apply its existing verification rules to in-bound calling seems driven entirely by the latter type of call, rather than the former.[78] However, as a carrier doing business with individuals making both types of calls, we can advise the Commission that -- particularly with respect to the former type of call -- verification processes and procedures will not be looked upon favorably by our customers.[79]

Contrary to the Commission's conclusion, it is not "practical" or "cost-effective"[80] to apply telemarketing rules in a context in which no real telemarketing

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[78] See MO&O ¶ 44 (focusing on inquiry callers' need for protections), ¶ 46 (suggesting that the inquiry customer might lack the focus of the pre-determined caller and, therefore, need more protection).

[79] In this regard, we support AT&T's position that those customers who have made a determination to change carriers "expect those orders to be implemented conveniently and promptly . . . without further involvement by the consumer." Id. ¶ 49, quoting from AT&T's Petition for Reconsideration at 10-11.

In rejecting AT&T's argument regarding the burdensome nature of a verification process for in-bound callers, the Commission states that AT&T had not "cite[d] to any relevant market research supporting their claims of consumer indifference or opposition to such safeguards." Id. ¶ 49. This is a bothersome observation.

A company that deals with thousands of callers per day and that serves millions of customers in the marketplace has an inherent understanding of what consumers will or will not tolerate by way of administrative processes. Consumers want companies to be "easy to do business with." There should be no need for "market research" in support of an argument based on day-to-day commercial practices and observations about conduct and actions within the context of those commercial practices -- practices and observations that a regulator lacks. The need for market research should be confined to matters that truly lack a touchpoint with respect to factual evidence, predictable commercial practice, or that are highly contentious. It would be a serious error to require businesses with ongoing relationships to have to provide "relevant market research" evidence for any assertion they make about consumers with whom they deal with every day.

[80] MO&O ¶ 46.

might be occurring. Nor does the institution of such practices and procedures advance "privacy protection" to any material degree, since most carriers are not slamming carriers, and those that are will undoubtedly continue in their bad-acting conduct, regardless of the Commission's rules.[81]

U S WEST asks that the Commission exclude expressly the application of its verification processes and procedures to individuals who initiate calls to carriers with the predetermination to order service. The failure to include such an exclusion

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[81] The Commission's insinuation of the "privacy card" into both the MO&O (¶¶ 50-51 and n.137) and the NPRM (at n.66, mentioning CPNI) unnecessarily complicates the current analysis by suggesting that carriers opposing the Commission's determination to apply its telemarketing rules to in-bound transactions care less about their customers' privacy than does the Commission. Such is an unfair suggestion.

While it is not wholly out of bounds as a supporting argument, privacy concerns are not at the heart of the slamming violation. Slamming is not generally perceived as intruding on privacy interests but as interfering seriously with the integrity and legitimacy of commercial transactions, transactions that should be capable of being conducted with speed and ease. Carriers which oppose the Commission's in-bound verification rules have no less regard for individuals' privacy than does the Commission. Rather, those carriers are suggesting that the costs of industry-wide verification rule applications do not warrant such action with respect to the fundamental problem, and even some incremental supporting benefit (i.e., protection of CPNI and "privacy") does not change the basic cost/benefit analysis.

Bad-acting carriers (those "some 'IXCs'" referenced by the Commission, citing to Consumer Action (MO&O ¶ 51 and n.140)) which interfere with fair and honest transactions and which -- should the Commission's referenced privacy interest be present in any fashion -- invade the privacy of telecommunications subscribers, should be the focus of the Commission's inquiry, not those carriers which present legitimate cost/benefit analyses. These bad-acting carriers should be prosecuted and fined because prosecution and fines -- not mandates on entire industries where "most" carriers engage in legitimate and fair business transactions – are the best way to protect individuals' privacy. Compare the Commission's observation that "some IXCs" abuse LOAs combined with checks, but "most IXCs" do not, forming the foundation for the Commission's refusal to prohibit such combined documents. Id. ¶ 53.

will result in the imposition of agreement verification burdens on all individuals calling in to carriers' operations.

The existing verification rules are simply not well-suited to transactions where a prior determination to order or switch service has been made. For example, a customer who provides verbal approval to change carriers is unlikely to return a written document subsequent to the call.[82] Similarly, a customer who just provided oral approval might well be put off and decline to participate in an electronic authorization process such as that outlined in the Commission's rules.[83] That same customer might well find a follow-up call from a third-party verifier to be an unwarranted intrusion and might respond by hanging up.

One of the primary reasons that the welcome package option discussed above should not be eliminated is because it is one of the few verification options that might lend itself well to in-bound calling verifications. Rather than impose its existing telemarketing rules on in-bound calls, U S WEST believes that the application of our recommended new subsection (a) to incoming calling would be sufficient to protect consumers and to assure that actions taken contrary to the representation provides appropriate Section 258(b) relief.

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[82] The Commission has acknowledged claims by IXCs that an absolute written document verification requirement would stifle competition since consumers often will not execute written documents even though they may have agreed to change carriers. In the Matter of Investigation of Access and Divestiture Related Tariffs, Phase I, Memorandum Opinion and Order, 101 FCC 2d 935, 942 ¶ 21 (1985).

[83] It is not clear from the Commission's rules whether the toll-free number required under the electronic authorization option must be dialed into by the customer in a separate transaction. If the electronic authorization process could be accomplished

While the Commission states in the NPRM that it believes it was correct in its original imposition of the telemarketing rules to such calls,[84] U S WEST disagrees as to the particulars of those rules. We are hopeful that the comments filed in response to the NPRM and PFRs filed with respect to the Commission's MO&O will convince the Commission to reconsider its position and to craft a rule more aligned with the problem sought to be corrected.

If, for some reason, the Commission remains unmoved with respect to its existing position that the verification rules as written will be those imposed on in-bound calls, U S WEST can imagine three applications that would be workable from a technical and administrative perspective (welcome package, electronic authorization, and third-party verification). We are concerned about the customer acceptance of two of those three options in an in-bound environment (the electronic authorization option[85] and third-party verification). Indeed, with respect to third-party verification, U S WEST ceased using such verification with respect to certain of our service offerings because of the lack of timeliness involved and the customer annoyance with the process.

Based on our expected volume of incoming calls, we would anticipate the options to cost as follows:

- Welcome Packet – Direct Mail costs of $.95 to $1.05 per mailing, **plus** any incentive added (such as a $1.00 or $5.00 prepaid calling card

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immediately through some type of on-line transfer, it might be more amenable to in-bound calling transactions.

[84] NPRM ¶ 19.

[85] See note 83 supra.

- Electronic Authorization – Approximately $1.35 per call.

Assuming that 15% of U S WEST's 14 million customers were to call into the business office each year and that the verification rules were applied regardless of whether there was a pre-determination to sign up for service or just an inquiry, U S WEST's costs would range from $!,995,000 to 2,205,000 for welcome package verifications utilizing direct mail (**plus** any additional incentives) and $2,835,000 for electronic verifications.

VII. PC FREEZES

U S WEST does not support the establishment of any specific Commission rules or regulations around the subject of PC freezes or communications by carriers about PC freezes, other than the proposed rule discussed above requiring full and fair disclosures. While no one would dispute that there are situations in which PC freezing an account is an appropriate response to consumer concerns and that such action operates to advance consumer protection goals,[86] U S WEST believes that affirmative communications to customers about PC freezes has a tendency to generate requests for such freezes. And, we believe, carrier freezes "have the effect of limiting competition among carriers" and impeding customer convenience.[87]

Because U S WEST believes that PC freezes have a tendency to impose a cumbersome barrier to commercial transactions that should be accomplished with

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[86] See, e.g., Staff Interpretative Ruling cited in NPRM at n.68 (addressing a California Public Utilities Commission-imposed PIC freeze *vis-a-vis* two specific carriers).

[87] NPRM ¶ 22.

ease, our preferred approach is to eliminate (through enforcement) the intentional slamming that is rampant in the marketplace and to prevent consumer misunderstandings in the first instance by requiring communications that are calculated to avoid misunderstandings.

Thus, with respect to the latter objective, we wholeheartedly agree with the Commission that the communication should include an "explanation of the subscriber's right to request such a freeze for its telecommunications service"[88] that "fully and accurately inform[s]" the subscriber of the effect of the freeze.[89] Such full and accurate information would require, at a minimum, that the various types of potentially affected services (i.e., telephone toll service and telephone exchange service) be clearly described.

Other than our comments above about the confusing nature of the current terms being used around the matter of toll service and the failure to mention the effect of a switch or freeze on the customer's existing relationship with its carrier, U S WEST expresses no opinion on the specifics of existing communications between carriers and their customers about PC freezes.[90] We do, however, seek clarification of the Commission's proposal as outlined in its NPRM.

[88] Id. ¶ 23.

[89] Id. ¶ 24.

[90] The Commission expresses the opinion that PC freeze communications that include "information and/or promotional materials regarding PC freezes along with a 'response form' that the subscriber is asked to sign and return" could be "at odds with the requirements of the Act and the Commission's rules and orders." Id. ¶ 23. U S WEST would urge extreme caution in the Commission's rendering of such an opinion where both the information conveyed and the solicitation are not clearly unlawful. While the Commission speculates that such a communication "might . . .

There, the Commission makes certain tentative conclusions about carriers "that mail[ ]" communications to subscribers about PC freezes. We request the Commission make clear in its final order in this proceeding that any PC freeze communication is at the discretion of carriers, and, only if such a communication takes place, do any Commission-promulgated rules become relevant.

VIII. LIABILITY ISSUES

A. Liability Of Subscribers To Carriers And Carriers To Subscribers[91]

Section 258(b) sets up liability from Slamming Carrier to Original Carrier in those cases where the subscriber has paid (presumably excessive rates) to the

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foster wide-spread confusion and dissatisfaction among consumers," (id.), a requirement that full and fair disclosure be made in the communication is clearly a superior remedy for such potential confusion than barring the communication entirely.

Nor does the Commission provide any explanation why a soliciting IXC that is also the subscriber's LEC would have an "unfair advantage in the toll service and local exchange markets" through such a communication, where the communication was not deceptive or misleading and where full and fair disclosure was made and the subscriber "expressly authorized" (id. at n.72) the PC freeze. U S WEST is concerned that the Commission's discussion in this area suggests restrictions on commercial speech that go substantially beyond time, place, and manner restrictions. We believe that absent demonstrated abuses or deceptions (such as a communication that misrepresents or fails to disclose material facts) -- factors that would certainly be considered in assessing the lawfulness of the communication in a Section 208 proceeding as the Commission has acknowledged (id. ¶ 24 and n.74) -- regulation in this area could be unlawful.

[91] The Commission treats these two matters as discrete areas of discussion in its NPRM. See id. ¶¶ 25-27 (subscribers to carriers), ¶¶ 29-30 (carriers to subscribers). This particular treatment produces a certain confusion because neither of these two fact situations is addressed specifically in Section 258 and because the dependency and interrelatedness of the fact patterns are never addressed clearly. In the former situation, there is discussion of absolution from payment, while in the latter situation there is discussion of refunds and reimbursements. U S WEST herein discusses the factual patterns as two sides of a coin, stressing the integration of analysis necessary to produce a rational resolution in this area.

Slamming Carrier. It does not address those situations where the subscriber has not paid -- either because the subscriber became aware of the slamming action prior to payment, because the subscriber was a slow-paying subscriber, or for any other reason.

In attempting to equalize the situations of both sets of subscribers, the Commission suggests various alternatives, primarily in an effort to make the slamming victim whole. Thus, in those cases where the subscriber has paid the Slamming Carrier and the Slamming Carrier has paid the Original Carrier, the question is raised whether the Original Carrier should reimburse the subscriber for some monies (presumably the amount in excess of what the Original Carrier would have charged),[92] and should then collect separately from the Slamming Carrier the administrative expenses, the restoration of premiums, etc., that the Original Carrier incurs.[93]

In those circumstances where the subscriber has not paid the Slamming Carrier in the first instance, the issue is raised as to whether the subscriber should be absolved from paying that Carrier. The extent to which the subscriber might be required to pay the Original Carrier, rather than the Slamming Carrier, is unclear from the discussion in the NPRM.

The Commission's desire to equalize the situations between the paying and non-paying subscriber is laudable. However, it requires the promulgation of rules and regulations beyond those required specifically by Section 258. Those rules

[92] Id. ¶ 29.

must be compatible with the overall Congressional intention represented in that section and must not be so burdensome and cumbersome to apply that the remedy becomes worse than the problem sought to be corrected. Certain of the NPRM discussions in this area suggest that such could easily become the case.

Addressing the paying subscriber first. The Slamming Carrier of that subscriber will pay the Original Carrier what the Slamming Carrier charged. Whether the paying subscriber needs to be "made whole"[94] (beyond the mere accommodation of the change back) will depend on whether the Slamming Carrier charged -- and the subscriber paid -- amounts materially in excess of what the Original Carrier would have charged.[95] If the subscriber did pay, then the Original Carrier might be required to return that "surplusage."[96]

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[93] Id. ¶ 30.

[94] Id. ¶ 29.

[95] While, in theory, any amount the subscriber paid to the Slamming Carrier in excess of what the Original Carrier would have charged might be returned on a "make-whole theory," such might create an administrative nightmare.

[96] It is not clear to U S WEST whether the Commission's proposal at paragraph 29 is that the entire amount of the payment from the Slamming Carrier to the Original Carrier or only the surplusage would be reimbursed to the slammed customer. If the former, U S WEST would object to the proposal for two reasons. First, such a proposal would seem to fundamentally alter the legislative scheme. It would have been easy for Congress to have proposed a direct reimbursement from Slamming Carrier to the subscriber, if that were the desired result (leaving the Original Carrier with foregone revenues), but it did not. See id. at n.83 (noting the Joint Explanatory Statement at 136 which states that the Slamming Carrier should reimburse the Original Carrier for foregone revenues). Furthermore, we would oppose such a proposal for the reasons discussed below regarding subscriber absolution from payment.

Furthermore, the Commission's proposed rules (Section 64.1170) do not reflect a "reimbursement" approach, but -- rather -- focus only on the restoration of